United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6145

Docket No. T-6462
76-6145

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P/S

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

LOREN E. DAMON, JR., by his
next friend, VIVIAN F. DAMON

Appellant

v.

SECRETARY OF HEALTH, EDUCATION
AND WELFARE

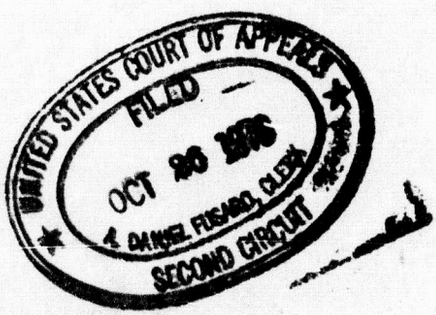
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

OF THE DISTRICT OF VERMONT

Docket No. 74-161

BRIEF OF APPELLANT



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ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in finding that the wage earner here (Vivian Damon) did not provide at least one-half of the plaintiff's support in the year before the wage earner became entitled to Social Security retirement benefits, as required by 42 U.S.C. §402(d)(8)?

2. If the District Court did not err in the above finding, whether 42 U.S.C. §402(d)(8) is unconstitutional in its support requirement for children adopted by a wage earner after the wage earner becomes entitled to Social Security benefits, when the support requirement is not imposed on natural child and step-children?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a case involving children's insurance benefits under the Social Security Act, 42 U.S.C. §402(d). By the final decision of the Secretary of H.E.W., hereinafter referred to as the Secretary, the appellant was found ineligible for benefits, and he appealed this decision. At issue here is a part of 42 U.S.C. §402(d)(8) which provides that a child adopted after a parent wage earner becomes entitled to Social Security benefits, must show that the parent wage earner provided at least one-half of the

child's support in the year preceding the wage earner's entitlement to benefits. Appellant contends that he met the statutory requirement, or, in the alternative, that the support requirement is unconstitutional. He seeks a declaration that he is eligible for children's insurance benefits.

II. PROCEEDINGS AND DISPOSITION BELOW

This case was filed on June 26, 1974 pursuant to 42 U.S.C. §405(g) to seek judicial review of a final determination of the Secretary that had found the plaintiff to be ineligible for child's social security insurance benefits as the adopted son of Vivian Damon, a recipient of old-age insurance benefits. On initial cross-motions for summary judgment, the District Court, by an opinion and order dated July 30, 1975, remanded the case to the Secretary for further administrative proceedings.

Following remand, additional testimony was taken, and the Secretary once again denied plaintiff's claim, by an order of the Appeals Council dated March 22, 1976. The case came again before the District Court on cross-motions for summary judgment, there being no disputed facts, and in an Opinion and Order dated August 19, 1976, as amended by an Order dated August 30, 1976, the District Court, per Judge Albert W. Coffrin, denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment. The appeal to this Court followed.

III. FACTS

The essential facts in this appeal are not in dispute, and it is only two (2) legal conclusions that appellant contests.

The facts show that, appellant (Loren Damon) filed his application for child's insurance benefits on June 14, 1972 (Initial Transcript of administrative record, p. 46-49, hereinafter referred to as Tr. #1, A-15) and that the application was denied initially on July 10, 1972 (Tr. #1, 50, A-15) and was denied on reconsideration on February 5, 1973 (Tr. #1, 58, A-15). A hearing was held on February 11, 1974 before Administrative Law Judge Albert P. Feldman (Tr. #1, 26, A-15) and by decision dated March 1, 1974 the A.L.J. held that the claimant was not entitled to child's insurance benefits on the account of the retired insured (Vivian Damon), because the A.L.J. found that the retired insured did not contribute one-half of the appellant's support, during the year immediately preceding Mrs. Damon's entitlement to retirement benefits, which entitlement occurred in November, 1971 (Tr. #1, 14-17). The Appeals Council approved this decision on May 17, 1974 (Tr. #1, 2), and thus it became the final decision of the Secretary.

An appeal was taken to District Court on June 26, 1974, and by an Opinion and Order dated July 30, 1975, the District Court remanded the case to the Secretary for further administrative proceedings. (Appendix-2, hereinafter referred to as A). Following remand, a supplemental hearing was held before A.L.J. Henry A. Milne on December 12, 1975, and Judge Milne reaffirmed the Secretary's previous determination and the Appeals Council adopted this conclusion in an Opinion dated March 22, 1976 (A-3). The case came before the District Court once again on cross-motions for summary judgment, and the defendant's motion was granted (A-17).

Appellant (Loren), now fifteen years old, was placed with Mrs. Damon by the Vermont Department of Social Welfare as a foster child when he was approximately one and a half years old, and lived with Mrs. Damon from that time to the present, except for a brief period of time in November, 1971, when he was taken from her house by the Department of Social Welfare. He was returned to Mrs. Damon in December of 1971, and has remained with her since that time. Mrs. Damon and her husband had wanted to adopt Loren since he was two years old, but were deterred on a number of occasions by Welfare Department officials who advised them that adoption was unnecessary, since Loren would never be removed from their house. The Damons relied on this advice, but when the Welfare Department did attempt to take Loren from them in November, 1971, which was conceded at the administrative hearing by the head of the foster care program as not being "a very wise thing to do", the Damons then promptly obtained an attorney, and initiated adoption proceedings, which became final on August 7, 1972. (Tr. #1, 31-34, 51-52, 58; A-4-5).

The timing of the adoption created the problem that is the basis of this lawsuit. If adoption had occurred prior to November 1, 1971, when Vivian Damon became entitled to retirement benefits, Loren's entitlement to child's insurance benefits would be undisputed, since the adopted minor child of an individual entitled to old-age benefits need only apply for child's benefits, 42 U.S.C. §402(d)(1)(A), and show that he is unmarried, 42 U.S.C.

§402(d)(1)(B), and living with the adopting parent at the time of application, 42 U.S.C. §402(d)(3). (A-1-2).

However, because Loren was adopted after Mrs. Damon became entitled to old-age benefits in November, 1971, he is required to show also that she was providing at least one-half of his support during the year immediately prior to her entitlement. 42 U.S.C. §402(d)(8), (A-2). During the year in question, the Damon's received foster care payments for Loren from the Vermont Department of Social Welfare which payments accounted for more than one-half of Loren's support. (A-2). The total expenditures for Loren from November 1, 1970 through October 31, 1971 were computed to be $1,017.97, and the State paid $918.00 to Mrs. Damon in that period as foster care payments. (A-15). Under a separate method of computation, it was determined that $1,446.50 was available to Loren as support during the year in question, and of that amount, $528.50 was found to have been contributed from the Damon's personal funds, and the same $918 came from foster care payments. (A-15). Under either computation, the foster care payments came out to more than one-half of Loren's support. The Secretary found, and the District Court affirmed, that the foster care payments constituted support from the State, and not from Mrs. Damon, and this was one of the legal conclusions that appellant disputes.

Other relevant facts show that from the time Loren was placed in the Damon home, he was treated as a natural son, and that Loren "...(c)ouldn't have been our own any more than if we'd a,

I'd a given birth to him." (A-4-5). The District Court specifically found that the relationship between Loren and his foster parents "...was as close as that of any child to natural or adopting parents." (A-5).

STATUTORY PROVISIONS

The following statutory provisions are relevant to child's insurance benefits:

> (d)(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability benefits ... if such child -
> (A) has filed application for child's insurance benefits,
> (B) at the time such application was filed was unmarried and (i) ... had not attained the age of 18 ... and
> (C) was dependent upon such individual -
> (1) if such individual is living, at the time such application was filed ... shall be entitled to a child's insurance benefit...
>
> 42 U.S.C. §402(d)(1).

> (d)(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and -
> (A) such child is neither the legitimate nor adopted child of such individual, or
> (B) such child has been adopted by some other individual.
>
> 42 U.S.C. §416(e).

> 8) In the case of -
> (A) an individual entitled to old-age insurance benefits ...
> a child of such individual adopted after such individual became entitled to such old-age ... insurance benefits shall be deemed not to meet the requirements of clause (i) or (iii) of paragraph (1)(a)(C) unless such child

> C) Is the natural child or stepchild of such individual... or
> (D)(i) was legally adopted by such individual in an adoption decreed by a court of competent jurisdiction within the United States,
> ii) was living with such individual in the United States and receiving at least one-half of his support from such individual (I) if he is an individual referred to in subparagraph (a) for one year immediately before the month in which such individual became entitled to old-age insurance benefits...
> 42 U.S.C. §402(d)(8).

These statutory provisions make it clear that any child, or legally adopted child, of an insured individual is eligible for child's insurance benefits if he filed an application for benefits, is under 18 at the time said application is filed, and is 'dependent' on the wage earner at the time the application is filed. 42 U.S.C. §402(d)(1). Moreover, under 42 U.S.C. §402(d)(3) a child is deemed dependent on the wage earner unless at the time said application was filed the wage earner was neither living with nor contributing to the support of the child. Thus, this is an almost irrebutable presumption of dependency, which plaintiff here clearly satisfies, as Mrs. Damon was living with plaintiff at the time of his application, at a minimum. Plaintiff was also the adopted child of Mrs. Damon, had filed an application for benefits, and was under 18 years of age at the time of said application. Thus, plaintiff is clearly eligible under the provisions of 42 U.S.C. §402(d)(1)(3).

However, 42 U.S.C. §402(d)(8) provides a different dependency test for children adopted after the wage earner becomes entitled to benefits, that test being whether the wage earner

contributed over one-half the support for the year prior to the month that the wage earner became entitled to benefits. An exception to this test is provided if the adopted child is the natural child or stepchild of the wage earner, for in those cases the original test or presumption of dependency under 42 U.S.C. §402(d)(3) applies. However, since plaintiff is not the natural child or stepchild of Mrs. Damon, he was held not eligible because Mrs. Damon was found not to meet the 'one-half support' test of dependency.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE WAGE EARNER HERE (VIVIAN DAMON) DID NOT PROVIDE AT LEAST ONE-HALF OF THE PLAINTIFF'S SUPPORT IN THE YEAR BEFORE THE WAGE EARNER BECAME ENTITLED TO SOCIAL SECURITY RETIREMENT BENEFITS, AS REQUIRED BY 42 U.S.C. §402(d)(8).

In order to qualify for benefits under 42 U.S.C. §402 (d)(8), the wage earner (Mrs. Damon) must show that she provided more than one-half of plaintiff's support during the year preceding the month in which she became eligible for social security retirement benefits. Since she received foster care payments during this period of time, the issue becomes how the foster care payments should be treated, i.e. whether it should be viewed as support provided by Mrs. Damon, as appellant alleges, or whether it should be viewed as support from a source other than the wage earner, as found by the Secretary, and affirmed by the District Court.

Appellant has not found much case law on this question, and relies primarily on Ketcherside v. Celebrezze, 209 F. Supp.

226 (D. Kansas 1962). That case involved the question of whether certain children were eligible for benefits on the record of their deceased wage earner mother. The determinative point was whether they received at least one-half of their support from their deceased mother, or whether they received it from their father. In computing the father's income, disability benefits he received through workman's compensation were included as part of his contributions to the support of the children, notwithstanding the fact that these were payments he received from an outside agency, like the foster care payments under consideration here. The father argued that these disability payments should not be considered as his income for the purpose of determining support.

The Court rejected his argument stating:

> "However, the exception under which plaintiff makes application for benefits for his children is expressed in language pertaining to the total contributions of deceased and this plaintiff for a period of time of at least a year prior to the deceased mother's death. The exception does not mention income as wages specifically, but states that contributions should be considered without regard to source." (emphasis added) Id. at 229.

Similarly, the statute here merely provides that plaintiff receive "... at least one-half of his support ..." from Mrs. Damon. It does not require that the support provided be in the form of wages earned by Mrs. Damon. Thus, following the same reasoning as the Court in Ketcherside, the foster care payments received by the wage earner here and contributed by the wage earner to the support of the claimant, should be counted as support

provided by the wage earner and she would then satisfy the requirements of the statute.

Initially, in dealing with this question of the treatment of the foster care payments, the District Court remanded the case for the taking of additional evidence concerning: whether any restraints are placed on the actual spending of the foster care payments; what happens to the surplus in the event that the foster parent provides the requisite care and maintenance but spends less than the allotted amount for the care of the child; how the payments are treated for income tax purposes; or any other indicia of ownership or control of the money (A-19-20).

In its final Opinion the District Court concluded that foster care payments are not designed as compensation to the foster parents. This is the critical point as appellant feels that the payments should be viewed as payments to foster parents for a wide range of services rendered to a foster child, rather than simply as payments by the State for the physical support of the child. If foster payments are viewed as payments to foster parents for services rendered than it would appear that the foster parents should be found as providing the support for the child. This would be so because then the foster payments would be analagous to wages or other types of compensation for services rendered, and could be viewed as the "property" of the parent, and hence the parent becomes the source of support of the foster child. However, if foster payments are viewed simply as payments by the

State for the physical support of the child, then the State is providing the support.

However, although the District Court concluded that foster care payments are not designed as compensation to the foster parents, it did note that this is contrary to the Vermont statutes and regulations on this point. The Vermont statutes define foster care as "care of a child for a valuable consideration in a child-care institution or in a family other than that of the child's parent, guardian or relative." (emphasis added). 33 V.S.A. §2752. Section 3410 of the Vermont foster regulations defines foster care as being "purchased" only from licensed child-care facilities (A-15).

As to the three (3) specific questions that the District Court alluded to in its remand Opinion, it would appear that two were answered in favor of plaintiff's position, and one was answered in favor of the Secretary's position. Looking at the question of whether there are any restraints placed on the actual spending of the payments, which plaintiff feels is at the heart of the matter, the testimony of Mrs. Remick, the Supervisor of the Vermont Foster Care program was quite clear. The payment comes in the form of a monthly check made out to the foster parents alone, and not as trustee for the child, and the only restriction of any kind is that a certain small amount each month ($10) is for clothing. Transcript 105-106, 115. (Transcript of Supplemental administrative record, 105-106, 115 hereinafter referred to as Transcript #2). Testimony went as follows:

> Q. Now, are there any actual restraints placed on how the parent will spend that

> money in a particular months after they receive that check?
>
> A. No. Not really, uh, as long as the child is getting proper care and enough food.
> Transcript #2, 106.

This basic theme, that there are no restraints on the actual spending of the money was repeated throughout Mrs. Remick's testimony. See, Transcript #2, 109, 117-118.

Even as to the $10 per month that is allocated for clothing, the testimony made it clear that a strict monthly accounting is not required, Transcript #2, 115. In the written evidence submitted at the hearing, the clothing allowance was described and all that was stated was that "...it will be helpful if you keep a record of clothing expenditures made in behalf of the child." Transcript #2, 152.

Thus, it is clear that there are no restraints placed on the actual spending of the foster care payments.

As to the question as to what happens to the surplus in the event that the foster parent provides the requisite care and maintenance but spends less than the allotted amount, it is also clear that the parents can keep the surplus and no refund is sought. Transcript #2, 117, 123.

Thus on these two basic questions going to the ownership and control of the money, the evidence clearly supports appellant's position. On the third question, how the payments are treated for income tax purposes, the evidence showed that foster care payments do not count as income for purposes of the Internal Revenue Service. Transcript #2, 153.

Appellant's basic position is that the foster care payments, in reality, if not in theory, represent payments to foster parents for a whole range of services rendered to foster children, including love, attention and emotional support, as well as food, lodging, clothing and physical support, and thus, if it is a payment for a service rendered by the foster parent, it should be viewed as support provided by the foster parent. Appellant submits that the evidence bears them out on this crucial point.

The Vermont foster care regulations also define the role of a foster family to include a whole range of services to be provided to the child, including, love, intellectual stimulation, etc. Transcript #2, 136-137. In fact, there is a special section of the regulations dealing with the emotional and social needs of the child. Transcript #2, 139.

All this goes to prove that the state is purchasing a range of services from foster parents, including emotional support and love, and that the foster payments, in reality, are not just for food and clothing, etc. Mrs. Remick recognized this in her testimony, and recognized that good foster parents treat the children as their own, Transcript #2, 109-110, but stated that foster parents aren't paid for the love and attention they give to the children, although it is expected and required of the foster parent. Transcript #2, 110.

The District Court recognized that foster parents exercise a great deal of control over the foster care payments, and that,

generally, the parents may spend the funds in any manner they choose in the foster child's best interests, and are expected to act as "surrogate parents", yet the Court still denied appellant's claim, reasoning that the foster parents do not acquire the funds as their "property". (A-7-8).

This, it would appear, too narrowly delineates the issue, to be one simply of providing cash support out of a parent's own financial "property". The Act, and implementing regulations do not have to be read so narrowly. The Act simply says that the wage-earner must provide over one-half of the child's support, and the implementing regulations define support as:

> "... food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for maintenance of the person supported." 20 CFR §404.350(c).

Other items of maintenance could and should, in this case, include the love and affection, and general emotional support the Damons provided to Skippy. The Vermont foster care regulations recognize this and define foster care as including maintenance (food, clothing, shelter, etc.) and the day to day care and supervision needed by the individual child (emphasis added). (Tr. #2, 130, 131). Also, as stated above, the Vermont regulations also define the role of foster parent to include a whole range of services to be provided to the child, including love, intellectual stimulation, etc. (Transcript #2, 136-37). In fact, there is a special section of the regulations dealing with the emotional and social needs of the child. Transcript #2, 139.

Thus, although it may be impossible to put a price tag on love and affection, it is recognized as an important element in the day to day maintenance of a child, and hence could be fit into the regulation defining support. It seems highly unfair and unreasonable that the admittedly minimal financing that Mrs. Damon received from the State ($918 per year), for the tremendous service that she provided for an abandoned child, is now going to disallow the child from receiving social security benefits. Although the monetary value of the support Mrs. Damon provided to Loren in terms of love and care cannot be compiled, to say that the Vermont Department of Social Welfare, and not Mrs. Damon, provided for Loren's support seems too unreasonable to uphold.

The District Court was quite sympathetic to appellant's plight here, and recognized "... if simple fairness alone is considered, it would seem that the child should prevail." A-3. It also recognized that the Social Security Act should be liberally construed in favor of the party seeking its benefits, A-4, and that so liberal is the approach that "obvious exceptions must be read into the statute when to do so is necessary to effectuate its purpose." A-4.

With this as the rule to be followed, it would appear not unreasonable to interpret the "one-half support" requirement to be met by Mrs. Damon in this case, and for this reason appellant would request this Court to find that the District Court erred in

not finding that Mrs. Damon provided one-half of Loren's support for the year in question, and thus to find plaintiff eligible for benefits.

A final reason for interpreting the statute in this manner would be to avoid raising the question of the constitutionality of the statute, for it is a familiar rule of statutory construction that statutes should be interpreted to avoid constitutional questions if at all possible. Crowell v. Benson, 285 U.S. 22 (1931).

II. IF THE DISTRICT COURT DID NOT ERR IN FINDING THAT MRS. DAMON DID NOT PROVIDE ONE-HALF OF LOREN'S SUPPORT, 42 U.S.C. §402 (d)(8) IS UNCONSTITUTIONAL IN ITS SUPPORT REQUIREMENT FOR CHILDREN ADOPTED BY A WAGE EARNER AFTER THE WAGE EARNER BECOMES ENTITLED TO SOCIAL SECURITY BENEFITS, WHEN THE SUPPORT REQUIREMENT IS NOT IMPOSED ON NATURAL CHILDREN AND STEP-CHILDREN.

If it is found by this Court that the wage earner did not contribute more than one-half of the support to the plaintiff here, and thus the appellant is found not to be eligible for benefits under 42 U.S.C. §402(d)(8), then appellant submits that the statute should be declared unconstitutional as it has been applied to him, as it denies him the equal protection of the laws, as guaranteed by the Fifth Amendment to the U. S. Constitution. It does this in two different ways, both of which appellant challenges as being unconstitutional.

The sections in the Social Security Act on children's benefits, 42 U.S.C. §402(d), set up various classifications of children, and apply different tests of eligibility for the various classes. For appellant, a child adopted after the wage earner

became entitled to retirement benefits, the "one-half support" test is required to prove eligibility. However, a natural child born after the wage earner becomes entitled to benefits, or a step child acquired after entitlement, are deemed dependent on the wage earner if he meets the standards of 42 U.S.C. §402(d)(3), which appellant admittedly meets here (A-1-2). 42 U.S.C. §402 (d)(3) provides that a child is deemed dependent on the wage earner unless the wage earner either was not living with the child or contributing to the support of the child, and the child is neither the legitimate nor adopted child, of the wage earner. Thus, it can be seen that this section provides almost automatically for eligibility, and appellant clearly meets this test as the District Court found (A-1-2).

Since appellant meets the (d)(3) test, but is ineligible solely because he does not meet the additional "one-half support" test provided in 402(d)(8), he submits he is denied the equal protection of the law. This is so because there is no rational basis for the differing treatment given the other two classes of children mentioned, natural children and step children, that is in any way related to the purpose of the statutory provisions in question.

At the outset, it is clear that although the Fifth Amendment contains no specific equal protection clause, equal protection standards have been found to be present in the due process clause of the Fifth Amendment. Richardson v. Belcher,

404 U.S. 78 (1970); Bolling v. Sharpe, 347 U.S. 497 (1953); Fleming v. Nestor, 363 U.S. 603 (1959); Jimenez v. Weinberger, 417 U.S. 628; 94 S. Ct. 2496; 41 L.Ed. 2d 363 (1974). Moreover, the Social Security Act itself, with its maze of different classifications and discriminations, has recently come under increasing equal protection attacks. Besides for the cases dealing with questions closely related to this case, to be cited shortly, other provisions of the Act have recently fallen under an equal protection analysis. See, Weinberger v. Wiesenfeld, 420 U.S. 636 (1957) (denial of benefits to widower where benefits allowed to widow held to violate equal protection); Davis v. Richardson, 342 F. Supp. 588 (D. Conn. 1972) affd w/o opin 409 U.S. 1069 (1972) (reduction of benefits to illegitimate children before legitimate children violates equal protection).

Appellant does not allege that any suspect classification or fundamental rights are involved, and thus the traditional equal protection test applies. That test was recently stated in Eisenstadt v. Baird, 405 U.S. 438 (1972) to be that:

> "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . (emphasis added) Id. at 447

Thus, the basic question presented here is whether differing treatment of adopted children, as compared to natural children and step children, is constitutional, in light of the above standards.

There have been two recent Supreme Court decisions in related cases which should provide the framework for proper analysis of this case. The first case was Jimenez v. Weinberger, 417 U.S.

628 (1974). That case involved a challenge to the provisions of the Social Security Act that required that an illegitimate child of a wage earner, who cannot qualify for benefits under any other provision of the Act, may obtain benefits if it is shown that the wage earner contributed to the child's support, before the wage earner became entitled to benefits. In Jimenez, the wage earner became entitled to disability benefits in 1963, and filed for children's benefits for two illegitimate children born after his entitlement. The act provided that certain sub-classes of illegitimate children, i.e. those who could inherit property under State law, or those whose paternity was acknowledged before the wage earner became entitled to benefits, could receive benefits without any further showing ofparental support. However, children like the Jimenez plaintiffs, who did not fall into any of these classes, were denied benefits because they could not show that the wage earner supported them. Thus, plaintiffs there challenged their exclusion from benefits on equal protection grounds.

The Court noted that the purpose of the additional requirements excluding some after-born illegitimates from benefits was to prevent spurious claims. 417 U.S. at 636. The Secretary there argued that the Act denies benefits to some after-born illegitimates "... because it is 'likely' that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner ... and because eligibility for such benefits would open the door to spurious claims." 94 S. Ct. at 2500. The Court

rejected this argument, in a holding very relevant here, when it stated:

> "Under this view the Act's purpose would be to replace only that support enjoyed prior to the onset of disability; no child would be eligible to receive benefits unless the child had experienced actual support from the wage earner prior to the disability, and no child born after the onset of the wage earner's disability would be allowed to recover. We do not read the statute as supporting that view of its purpose."

Thus, the Court in Jimenez rejected the view that children's benefits were only to replace support lost by a wage earners retirement, disability or death.

In the second case to be analyzed, Mathews v. Lucas, 44 U.S. L. W. 5139 (1976), the Court again seemed to agree that the statutory structure, wherein some children are 'deemed dependent' without any showing of support. would belie a legislative purpose of only providing benefits for children who actually lost the support of their parent by death, retirement or disability. Id. at 5143, n. 14.

The Court in Jimenez recognized the legitimate government interest in preventing spurious claims, i.e. a spurious acknowledgment of paternity to get additional benefits, but held that:

> "It does not follow, however, that the blanket and conclusive exclusion of appellant's sub-class of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency

> and their right to insurance benefits, and it would discriminate between the two subclasses of after-born illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses. (emphasis added) 417 U.S. at 636

Finding that the Act deemed some illegitimates dependent without any showing of actual dependency, while conclusively denying benefits to the plaintiffs, the Court found the statute to be both 'over-inclusive' and 'under-inclusive', and thus denied equal protection to the plaintiffs, since the potential for spurious claims was equal for all classes. 417 U.S. at 647.

This reasoning on the prevention of spurious claims is also relevant here, as the District Court found that Congress was legitimately concerned that adoption might take place solely for the purpose of obtaining Social Security benefits, and the one-half support requirement was designed to safeguard against this. A-10. Appellant believes the District Court improperly lumped together the Jimenez reasoning (i.e. prevention of spurious claims) with the Lucas reasoning (i.e. administrative convenience), and that these represent two distinct questions and should be dealt with separately. These would appear to be the only two purposes of the challenged provisions of the Act, and even though both will be analyzed separately, the same basic question remains; i.e. is it rational to treat adopted children differently than natural children/step children, in light of each of these asserted purposes of the Act.

Turning to the question of the prevention of "sham" adoptions by persons desiring to adopt children solely to obtain

additional Social Security benefits, it is true, as the District Court noted, that the House Report, in discussing the Social Security Admendments of 1972 regarding adopted children, did note a concern for this problem. 1972 U. S. Code Cong. & Adm. News, p. 5039. However, the entire legislative history of the Social Security Act regarding the eligibility of adopted children is extremely complex, and at least on point another House Report had noted that this was not a major concern. In 1946, the eligibility requirements for adopted children were changed to impose a 36 month waiting period for adopted children with no need of showing support prior to the wage earner's entitlement, but only the need to show support at the time of the child's application. Under this statute, Loren would be eligible now.

The House Report stated that the reason for the amendment was to correspond with a similar amendment establishing a similar 36 month duration-of-relationship requirement for wife's benefits. H. R. Rep. No. 2526, 79th Cong., 2nd Sess. 26 (1946). The reason for the amendment to the wife's benefits section was that:

> "Few persons are likely to marry because of the prospect of receiving a modest insurance benefit which will not be payable until after 3 years." H.R. Rep. No. 2526, 79th Cong. 2nd Sess., 25 (1946).

Thus, whatever common sense might dictate concerning whether a person would actually adopt a child solely to receive a modest social security raise, the legislative history is at least somewhat ambiguous on whether Congress really felt this to be a problem.

However, assuming, as did the District Court, that this was one of the purposes of §402(d)(8), the question becomes, as it did in Jimenez whether singling out adopted children, while not similarly dealing with other classes of children, such as natural children or step children, denies equal protection. In the Jimenez language, the question is whether there is a greater potential for spurious claims with adopted children than with natural or step children. Put another way, the question becomes whether it is more likely that a person would adopt a child to acquire additional benefits, than it would be for a person to conceive a child of his own (a natural child) or acquire an additional child through marriage (a step child). Since a person could "get" a child in one of three ways to increase his benefits, i.e. by adoption, conception, and marriage, the question is whether it is rational to conclude that adoption is more likely to occur than the other two methods, and thus that adopted children should be singled out for different treatment.

There has not been any Supreme Court opinion yet on adopted children's eligibility for Social Security benefits, but there have been several lower federal court decisions, and at this point it is helpful to examine the case of Rogers v. Weinberger, CCH Unemp. Ins. Reporter para. 17,490 (E.D. Tenn. 1973). That case like this one, involved a challenge to the requirement that children adopted after the wage earner became entitled to benefits must show that he received at least one-half of his support

from the wage earner prior to eligibility.

In Rogers, the Court found that a child who is born to a parent after eligibility is entitled to benefits, yet a child adopted by a parent after eligibility must satisfy the "one-half support" test. Recognizing, as we have, that

> "... the Act was not meant to provide benefits to a child who was adopted solely to gain these benefits ...",

the Court went on to state:

> "A constitutional issue arises, however, when one searches for a rationale for the different treatment of after-born natural children and after-born adopted children." Id.

The Court stated that the primary reason for the classification was to provide safeguards against abuse through adoption of children solely to qualify them for benefits, but then reasoned:

> "While this is a legitimate legislative goal, the classification enacted to reach that goal is simply not rational. This Court can find no significant distinction between a child voluntarily adopted by disabled parents and a child voluntarily conceived by disabled parents. And yet the former, even though adopted from laudable motives, is excluded from benefits while the latter is eligible for benefits, even though conceived 'solely to qualify for benefits'. This distinction is even more puzzling when one considers the nature of adoption proceedings. These proceedings are regulated by statute in all states. The Tennessee adoption procedure, under which the plaintiff was adopted, is a quite strict and closely supervised procedure. Upon the other hand, the conception of children in wedlock is without legal regulation. If the legislative concern is that children acquired 'solely to qualify them for benefits' be excluded from the benefits, it would appear that

> the opportunities for this occurring are at least equally as great, if not greater, where the child is natural born rather than adopted, and yet the Act purports to prevent fraud in this regard by totally excluding after-born adopted children from benefits while granting benefits to after-born natural children."

Appellant believes that this well-reasoned opinion is equally applicable in this case, and mandates a conclusion that appellant was denied equal protection. A natural child born after eligibility is deemed dependent, while appellant, adopted after eligibility for laudable motives is denied eligibility. The above reasoning indicates there is no rationality for the differing treatment, and if natural children born after eligibility do not have to satisfy the "one-half support" test, neither should children adopted after eligibility.

In Vermont, like Tennessee, adoption is strictly regulated by statute, 15 VSA §431 et seq., while conception is without legal regulation. If a person sought to adopt a child solely to qualify him for benefits, it is doubtful that the adoption would ever be approved under Vermont law, as a full and thorough investigation, report, and hearing are necessary. The present case is one on point. It is clear beyond any doubt that Mrs. Damon did not adopt Loren solely to qualify him for benefits. She cared for and raised him since he was an infant, and would have adopted him earlier, but for the position of the Vermont Department of Social Welfare. (Tr. #1, 32-33). If Loren had been adopted earlier, he would clearly be eligible for benefits, so it is merely the fortuitous circumstances of the

actual date of the adoption that is a bar to benefits at the present time.

Moreover, as the Rogers court found, it is clear that the parental obligations to adopted children in Vermont are just as great as parental obligations to natural children, and thus plaintiff would request this Court to follow the reasoning in Rogers and grant benefits upon a finding that:

> "There being no rational basis for the classification at issue, the Court finds that classification to be violative of the due process clause of the Fifth Amendment." Id.

Although the Rogers case dealt only with discrimination between after-born and after-adopted children, its principles are even more applicable to the other sub-class involved, that of step children. A person "acquires" a step child by marriage and without any legal regulation. However, a step child acquired after eligibility is deemed dependent while an after-adopted child is not. For the same reasons as were present in Rogers, there would not seem to be any rational basis for the differing treatment as it is easier to "acquire" a step child than to adopt a child, and thus the likelihood of people acquiring step children solely to qualify them for benefits is as great or greater than persons adopting children solely to qualify them for benefits. The preceding discussion is particularly true in present times, when there is a scarcity of adoptable children, and this scarcity strengthens plaintiff's argument that it is irrational to dis-

criminate between adopted children, natural children, and step children.

Another case which is helpful to examine is Stanley v. Secretary of HEW, 356 F. Supp. 793 (W. D. Missouri, 1973). That case, like this one, was a challenge to the requirement that a child adopted after the wage earner became eligible for retirement benefits has to show that he received at least one-half of his support from the wage earner in the year prior to eligibility. Like the appellant here, the plaintiff is Stanley met all of the other eligibility requirements, and satisfied the 402(d)(3) tests which would deem him dependent on the wage earner, but could not satisfy the "one-half support" test. Thus, this case is squarely on point with ours.

The court in Stanley concluded that the additional eligibility requirements imposed violated the standards of equal protection embodied in the due process clause of the Fifth Amendment. The Court ruled that there was no permissible rational distinction between natural children, stepchildren, and adopted children. Id at 805. The Court then concluded that since the child in that case was not adopted solely to qualify him for benefits, and since he satisfied all of the other eligibility requirements imposed by Congress, that he was entitled to benefits. Id at 806. Similarly in our case, since it is clear that the appellant was not adopted solely to qualify him for benefits, this Court should order benefits accordingly.

The District Court, in dealing with the issue of "spurious"

claims relied solely on Weinberger v. Salfi, 422 U.S. 749 (1975). It is submitted that Salfi is completely distinguishible from this case, and the more appropriate cases to provide analysis here are Jimenez and Lucas.

For one, the requirement attacked in Salfi was a duration of relationship requirement, i.e. that the widow have been married to the wage earner at least nine (9) months. Tied in with this is that the Salfi attack was principally a due process (irrebutable presumption) argument, while here we are dealing with a traditional equal protection attack. This really gets to the heart of the difference because in Salfi there was not an attack on different sub-classes of widows, while here the attack is on differing treatment accorded to different sub-classes of children. Appellant here would have no problem if the statute provided that to be eligible for children's benefits, a child must have been a child of the wage earner for a set period of time (9 months or whatever) as long as that requirement applied equally to adopted, natural and step children. The problem in Salfi thus did not focus on discriminations between different sub-classes of widows who alleged that there was no rational basis to treat them differently as the attack here does.

The Court in Salfi analogized to principles of insurance, wherein only certain risks are covered, and thus the risk only applied to marriages that lasted more than 9 months. 422 U.S. at 776. Here, it is not certain risks that are not being covered, but a certain sub-class of children who are not be covered.

Moreover, the Court in Salfi found that the statute bore a rational relationship to a legitimate legislative goal. 422 U.S. at 777. Here, the statute should also be sustained if this Court finds that differing treatment of adopted children as per natural and step chidlren bears a rational relationship to the purposes of the challenged section. Appellant submits that it does not. Thus, at a minimum, in Salfi there was some rationality for the challenged section while here there is not.

The Salfi court also discussed the fact that the rule was directed toward situations "... lacking certain characteristics which might reasonably be thought to establish the genuineness of a marital relationship..." 422 U.S. at 780. Here, the reasoning begins to blend in with the Lucas decision, which appellant feels is the closest case to this one, as the support requirement seems to be looking toward the establishment of a genuine family relationship as the basis on which to award benefits.

We now turn to an analysis of the Lucas decision, for this appears to be the case which should set the standards to be applied here. The District Court in its Opinion apparently recognized that Lucas was dispositive of the issue, A-12, but concluded that it compelled a disposition in favor of the defendant. Appellant agrees that Lucas is dispositive, but feels it compels a disposition in favor of appellant. Quite frankly, appellant felt initially that the unfavorable decision against the Lucas plaintiffs would adversely affect the constitutional claims here, but upon a close analysis of the decision and its reasoning, it is submitted

that Lucas compels a favorable decision for appellant here.

Lucas involved a constitutional challenge to the provisions of the Social Security Act that condition the eligibility of certain illegitimate children for survivors benefits upon a showing that the deceased wage earner was living with or contributing to the support of the child at the time of his death. The plaintiffs in Lucas had been born to the deceased wage earner, and had lived with him for a period of time, but at the time of his death he was neither living with, nor supporting them at all.

Under the Act, certain children were relieved of this requirement of showing support and were deemed dependent on the wage earner. These children were: legitimate children; children who are entitled to inherit property under the applicable state intestacy law; and, illegitimate children whose father either: a) had gone through a marriage ceremony which was invalid because of a nonobvious legal defect; b) had signed a written acknowledgment of paternity for the child; c) had been decreed by a court to be the child's father; or d) had been ordered by a court to support the child because the child was his. However, the plaintiffs in Lucas did not fit into any of these classes, and they challenged the requirement of support as it was applied to them.

The Secretary in Lucas argued that the purpose of the Act was to provide support lost by a child when his father dies. 44 L.W. at 5143. The Supreme Court recognized that this purpose was contradicted by the "deemed dependent" section of the Act and that the presumptions of dependency created for the "advantaged

children" was overinclusive in that some children would get benefits without having to show any support. 44 L.W. at 5143. However, the Court stated:

> "We conclude that the statutory classifications are permissible, however, because they are reaonably related to the likelihood of dependency of death." (emphasis added) Id. at 5143.

Thus, this was the heart of the Lucas decision; that it was rational to conclude that children in the advantaged classes (legitimate children and certain other illegitimates) would be more likely to be dependent on their parents than children in plaintiff's class. The Court recognized that the purpose in adopting the presumptions of dependency was to serve administrative convenience Id at 5143, and that

> "... by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case where dependency is objectively probable." (emphasis added) Id. at 5143.

In reiterating its reasons for upholding the statutory classifications in Lucas the Court stated:

> "The presumption of dependency is withheld only in the absence of any significant indication of the likelihood of actual dependency. Moreover, we cannot say that the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. Id. at 5144.

In quoting from the original district court opinion in Norton v.

Weinberger, the Supreme Court stated:

> "It is clearly rational to presume the overwhelming number of legitimate children (and the certain other favored classes of illegitimate) children are actually dependent upon their parents for support..." Id. at 5144.

Thus, the Court upheld the statutory classifications because it found that the "favored classes" were more likely to be dependent than plaintiff's class (illegitimate children for whom there was never a written acknowledgment of paternity, or a court decree of paternity or support, etc.). In discussing why some illegitimate chidlren are favored, the Court implied that the favored classes of children are viewed by society as having a closer relationship with their parents than plaintiff's class, Id at 5145, and thus, it is rational to presume dependency for the favored classes, although there will be cases of overinclusion, where benefits are granted although there was no dependency.

Applying this reasoning to our case, it is submitted that the statutory classifications here are still invalid. The major difference is that our case involves differential treatment of adopted children as to natural and step children. Using the Lucas reasoning, adopted children would also fall into the class of children whose "...dependency is objectively probable," certainly as much as natural or step children, Lucas at 5143, and adopted children would not fall into the class of children where "The presumption of dependency is withheld (because of) the absence of any significant indication of the likelihood of actual dependency."

Lucas at 5144. As previously noted, adoption is a closely regulated action in Vermont, and society certainly expects an adopted child to be dependent on his parents. Thus, the basis for the discriminatory treatment that was present in Lucas for the class of illegitimate children there, i.e. less likelihood of dependency as a class, is absent here.

This "societal" view of the felt parental obligation to support, which was noted by the Supreme Court in Lucas, at 5145, is reflected under Vermont statutes. Pursuant to 15 V.S.A. §448, upon the issuance of a final adoption decree, the same rights, duties and obligations exist between the parties as though the child was a natural child. Certainly for support, an adopting parent is fully obligated to support the adopted child in the same manner and to the same extent as a natural child.

However, in Vermont, a step parent is only liable to support a step child for so long as the marital bond creating the step relationship shall continue. 15 V.S.A. §296. Thus, if a father adopts a child, and then is divorced, he is still liable to support the child, the same as a natural parent. However, if a father acquires a step child by marriage, and then is divorced, he is no longer liable to support the child.

Thus, clearly, adopted children are viewed by society as more likely to be dependent on their parents than step children, and equally likely to be as dependent as natural children. Yet, natural children and step children are deemed dependent by the Act, while adopted children are not. Thus, completely in line

with the reasoning in Lucas, there is no rational basis for the differential treatment given to adopted children, as compared to natural and step children.

The District Court, in discussing Lucas, did not appear to analyze the underlying reasoning behind the decision, and simply concluded that while it might have been more equitable to extend the presumption of dependency to adopted children, it was not unconstitutional to fail to do so. A-13. This, it is submitted, is erroneous.

Thus, whether one uses as the legislative purpose behind the challenged statute either the prevention of spurious claims, or administrative convenience, there is no rationality in treating adopted children different from natural children or step children.

CONCLUSION

Appellant submits that he has shown that the wage earner here, Vivian Damon, did contribute more than one-half of his support during the year in question and thus that he is eligible for child's benefits under 42 U.S.C. §402(d)(8). In the alternative, appellant submits that the one-half support requirement imposed by 42 U.S.C. §402(d)(8) is unconstitutional.

Accordingly, appellant would request that the Order of the District Court granting defendant's Motion for Summary Judgment be reversed, and that this Court order that summary judgment be granted for appellant, and that benefits be ordered to be paid accordingly.

Respectfully submitted,

Dated: 10/20/76

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Vermont Legal Aid, Inc.
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VERMONT LEGAL AID, INC.

10-26-76
by mail

October 20, 1976

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REPLY TO: 55 Main Street
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Mr. A. Daniel Fusaro, Clerk
United States Court of Appeals,
Second Circuit
Foley Square
New York, NY 10007

Re: Damon v. HEW, Docket No. T-6462

Dear Mr. Fusaro:

Enclosed please find the original and three copies of an Appendix, and Appellant's Brief for filing relative to the above-entitled matter. Since this was an appeal in forma pauperis, I believe this is the appropriate number of copies to be filed with the Court. One copy of the Appendix and Brief has been sent to the opposing party.

Sincerely,

Zander B. Rubin
Staff Attorney

ZBR:cds

Enclosure

cc: Jerome Niedermeier, Esq.